

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No.11159 of 2012 (O&M)

Date of Decision: 23.03.2017

M/s Prem Bansal Real Estate Private Limited

....Petitioner

Vs.

M/s Satish Kumar Contractor Limited and another

....Respondent

CORAM: HON'BLE MR.JUSTICE R.K. JAIN

Present: Mr.Sunish Bindlish, Advocate,
for the petitioner.

Mr.D.K. Singal, Advocate,
for respondent No.1.

RAKESH KUMAR JAIN, J. (ORAL)

The petitioner is aggrieved against the orders dated
21.01.2012 and 27.04.2012 passed by respondent No.2.

In short, an agreement dated 07.09.2005 was entered into
between the parties for the construction of Swastik Apartments,
Satyam (Phase-1) at Patiala Road, Zirakpur. There was some dispute
between the parties, therefore, respondent No.1 moved an application
under Section 11 of the Arbitration and Conciliation Act, 1996 [for
short 'the Act'] before this Court for the purpose of appointment of an
Arbitrator. The said application was allowed and respondent No.2 was
appointed as Arbitrator. The petitioner had challenged the order of
this Court, appointing the Arbitrator, before the Supreme Court on the
ground that the Arbitrator cannot be appointed as the issue involved is

regarding 'excepted matter'. The said petition was disposed of by the Supreme Court on 10.5.2011 by passing the following order: -

“The petitioner apprehends that he may not be permitted to raise the question on excepted matters before the Arbitrator. He can certainly do so having regard to the decision in S.B.P. & Co. Vs. Patel Engineering Ltd. & Anr. 2005 (8) SCC 618 and National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd. 2009 (1) SCC 267.”

Consequently, the petitioner moved an application under Section 16 of the Act to the Arbitrator, questioning his jurisdiction to decide the 'excepted matter'. The said application was filed by petitioner before the statement of defence was entered into, however, the said application was not decided by the Arbitrator on the ground that the application cannot be decided as the pleadings are incomplete and the evidence is yet to be brought on record, much less, the petitioner has not filed the detailed reply to the statement of claim. It is submitted that instead of deciding the application, the Arbitrator continued the proceedings and passed the order dated 27.04.2012 by which the claim statement made by respondent No.2 was allowed to be amended without notice. Aggrieved against both the orders, present petition has been filed.

Learned counsel for the petitioner has referred to the provisions of Section 16 of the Act, which are also reproduced herein for ready reference: -

“16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or

participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

According to Section 16(2) of the Act, a plea that the arbitral tribunal does not have jurisdiction has to be raised not later than the submission of the statement of defence but it further provides that the applicant shall not be precluded from raising such a plea

merely because that he has appointed or participated in the appointment of an arbitrator. Section 16(5) of the Act provides that arbitral tribunal shall decide on a plea, referred to, in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, it may continue with the arbitral proceedings and make an arbitral award. Section 16(6) of the Act provides the remedy to the aggrieved party to challenge the arbitral award in accordance with Section 34 of the Act, therefore, there is no remedy available to the petitioner except to file the present writ petition under Section 226 of the Constitution of India in order to challenge the arbitrary action of the Arbitrator, who is not complying with the provisions of the Act.

The issue of jurisdiction has to be first decided by the Arbitrator on the application of the petitioner without waiting for the statement of defence to be submitted by the petitioner to the statement of claim made by respondent No.2, therefore, there is a complete violation of Section 16(2) of the Act. The order passed by the Arbitrator dated 27.4.2012 is also illegal because the claim statement is just like the plaint having been filed by the claimant and any amendment in the claim statement has to be entered into after notice to the other party.

Therefore, I am of the considered opinion that there is merit in this writ petition, hence, the same is hereby allowed and both the impugned orders are hereby quashed. Direction is issued to the Arbitrator to decide the question of its jurisdiction, at the first instance, on the application of the petitioner *de hors* the reply to be

filed by the petitioner to the claim statement made by respondent No.2. Needful shall be done within a period of two months from the date of receipt of certified copy of this order. In case the application is dismissed and the Arbitrator decides to continue with the arbitration proceedings, respondent No.2 shall be entitled to file an application for amendment of the claim statement, which shall be entertained by the Arbitrator.

23.03.2017

Vivek

**(RAKESH KUMAR JAIN)
JUDGE**